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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. ———

LEWIS JOHNSON, LO GOODE, PAUL MacFARLAND and TOWN OF LACONA, a Municipal Corporation, *Petitioners,*

vs.

CHARLES E. SELLERS, L. R. OLMSTEAD, HERMAN AALDERS, LESTER NEWMAN, RICHARD DICKEY and WILLARD MOORE, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Lewis Johnson, Lo Goode, Paul MacFarland and Town of Lacona, a municipal corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in this cause on October 20, 1947, which reversed a decision of the District Court of the United States for the Southern District of Iowa

in favor of petitioners and remanded the cause for decree in conformity with its opinion.

SUMMARY STATEMENT OF MATTER INVOLVED.

Respondents commenced this action in the United States District Court for the Southern District of Iowa under the Civil Rights Act of 1871, as amended, (8 U.S.C.A. Sec. 43), in order to obtain a declaratory judgment defining the constitutional rights of Jehovah's witnesses in the use of the public park in the town of Lacona, Warren County, Iowa, and to secure a permanent injunction against alleged interference with those rights.

The six individual respondents brought the action for themselves and as a class action for others of Jehovah's witnesses similarly situated in Iowa against the town of Lacona, which is an Iowa municipality (400 people) and against Lo Goode and Paul MacFarland, respectively mayor and marshal of said town, and Lewis Johnson, sheriff of Warren County, Iowa, wherein the town of Lacona is located. The complaint claimed that the Des Moines company or congregation of Jehovah's witnesses attempted to hold a series of religious meetings in the Lacona park on four successive Sundays commencing September 1, 1946, but were prevented from completing the same by resolutions or motions of the town council of Lacona requiring council permission for use of the park and by action of a mob, and that the individual petitioners wrongfully barred them from the town and park under pretext of exercising the police power to prevent rioting and mob action, and thereby deprived them of free speech, assembly and worship, as guaranteed under the 1st and 14th Amendments to the Constitution of the United States. (Complaint at R. 2-20).

The petitioner, sheriff Johnson, filed a separate answer denying most of the allegations of the complaint, and admitting respondents' constitutional rights and their right to use of the Lacona park, subject only to reasonable regulation and control of the town and to proper exercise of the state police power in safeguarding the public welfare. He admitted that on September 15, 1946, he blockaded the public highways leading into the town of Lacona against all persons whomsoever, with a few exceptions such as a doctor and people returning to their homes, (and thereby excluded Jehovah's witnesses and the public generally from Lacona and the park therein on September 15, 1946), and did so on the advice of the attorney for the town of Lacona, the County Attorney of Warren County, Iowa, and the Attorney General of Iowa, for the sole purpose of preventing a breach of the peace and rioting, and in order to protect all members of the public, including Jehovah's witnesses. (R. 21-23).

The other petitioners answered, admitting respondents' constitutional rights and their right to use of the Lacona park to the same extent as admitted by the sheriff, and denied other allegations of the complaint. (R. 24-26).

Facts developed at the trial showed that prior to the first proposed meeting on September 1, 1946, respondent Sellers went from Des Moines to Lacona, where no Jehovah's witnesses lived, and, while he requested no permission from the town council, he did secure permission to use the park for the four proposed meetings from two members of the five man town council whom he saw privately. (R. 233 and Finding 9 at R. 247).

On August 31 and September 1, 1946, Jehovah's witnesses advertised their meetings in Lacona by placards in business houses and on the streets and sidewalks and in public places and offered their leaflets and books and pam-

phlets for sale from door to door and house to house—all without interference by anyone. (R. 137-138 and 79-81 and 233).

The first meeting was held in the park as scheduled on September 1, 1946, after the petitioner Goode, as mayor, refused to stop it on the request of some protesting citizens and told them Jehovah's witnesses had a lawful right to hold the meeting and talked them out of trouble. (Finding 4 on R. 246 and C.C.A. opinion, R. 258).

A strong feeling of opposition broke out in the community because of Jehovah's witnesses' attitude opposing the draft and refusing to take part in the second World War. (R. 233).

At its regular meeting on September 2, 1946, the Lacona town council adopted a motion "that the Lacona City Park or Public Square cannot be used for any meetings or congregations of any kind unless it be brought up before the Town Council and voted on". (R. 233, 259).

Sunday, September 8, several carloads of Jehovah's witnesses appeared in Lacona and attempted to hold the second scheduled meeting in the park during the absence of the petitioners, sheriff and mayor, and a crowd of 700 or 800 gathered in the square block park and surrounding streets. Extensive rioting and fighting broke out between members of the crowd and Jehovah's witnesses, resulting in numerous personal injuries. Petitioners, sheriff Johnson and mayor Goode, were not present when the trouble started, but came when called and arrived after the trouble was over. All parties agreed no meeting could be held that day. (Findings 7 and 8, R. 247).

On the following two days, September 9 and 10, Jehovah's witnesses swore out informations for the arrest of numerous persons who opposed them in the rioting in the

park on September 8 and the petitioner, sheriff Johnson, arrested all persons against whom such warrants were issued. (R. 75, 76).

On September 10, 1946, the Lacona Town Council adopted a motion "that Mayor Goode serve notice on C. E. Sellers of the Jehovah's witnesses that the Town Council have prescribed rules for the use of the public park in Lacona and that they will have to have permission from the council before holding meetings in the park, or this will be deemed an unlawful act and be punished as such." The Mayor caused such a notice to be given. (R. 32, 260). The sole purpose of this motion and notice was to stop rioting and violence and keep order. (R. 38, 47-48, 57-59).

During the week between September 8th and 15th sheriff Johnson and mayor Goode tried to dissuade the Witnesses from holding a meeting in the park on the 15th for the reason they were afraid of trouble they couldn't handle, and to have the Witnesses secure a private place for their meeting where the sheriff could more easily protect them, but the Witnesses insisted they were going to use the park whether there was trouble or not. (Finding 12, R. 247-248 and R. 235).

During this same week the sheriff and mayor received reports that if the Witnesses attempted to hold a meeting in the Lacona Park on the next Sunday, September 15, there would be trouble and bloodshed; that hundreds of G.I.'s (1500 from Ottumwa alone) were coming from surrounding counties and towns to stop the meeting. The Sheriff at Chariton, (county seat in an adjoining county), advised by telephone that neither he nor the petitioner, sheriff Johnson, could handle the G.I.'s coming from Chariton alone. (R. 236, and 266-268).

Believing that rioting and bloodshed were imminent,

the petitioner, sheriff Johnson, then sought legal advice and in company with the petitioner, mayor Goode, and the Warren County attorney and Lacona town attorney went to the office of the Iowa attorney General in Des Moines where he was advised he could not have the Iowa National Guard, (R. 77, 78), but it was his duty to keep the peace and he should permit no meetings in Lacona on September 15 and should blockade all highways and permit no one to enter or leave the town that day except for emergencies. (Findings 13 and 14, R. 248 and R. 69).

Acting on his own judgment and this advice and believing that it was the only way he could keep the peace and protect the general public, petitioner, sheriff Johnson, called off two ball games and a family reunion scheduled in Lacona on September 15, advised citizens outside Lacona to go elsewhere to church that day, notified sheriffs of surrounding counties that no meetings would be permitted in Lacona that day and that the roads leading thereto would be closed, and with the aid of specially deputized citizens and state highway patrolmen blockaded the four highways leading to the town and permitted no one to enter or leave the town that day except for emergency cases. Among others turned back at the blockade and prevented from entering the town on that day were several carloads of Jehovah's witnesses. (R. 77, 237, 261).

September 25, 1946, respondent Sellers wrote a letter to the mayor and council of Lacona asking permission to use the park for a meeting on September 29 and stating the Witnesses would use the park that day whether they had permission or not. At a special meeting the town council voted not to give them permission to use the park on that day, but didn't notify the Witnesses of this decision on the ground it would do no good since they stated they were coming anyway. (R. 237, 261-262).

This action was then commenced. At the conclusion of full trial below the District Court filed an opinion containing fact findings and conclusions of law, (69 F. Supp. 778 and R. 232), and also separate fact findings and conclusions of law. (R. 246). He found:

1. Jehovah's witnesses had a constitutional right to use the Lacona park on the dates involved and the purposes for which they assembled were peaceful. (Findings 1 and 2, R. 248).

2. Enactments of the Lacona town council were unconstitutional and void, but carried no penalty, were unenforceable, were not enforced, and ignored by the Witnesses, and were too slight and inconsequential to warrant injunction under the rule requiring irreparable injury both great and immediate. (R. 239, 240 and Findings 3 and 4, R. 248).

3. The individual petitioners did not refuse legal protection to the Witnesses and were not guilty of conspiracy as charged by respondents, but were amiably disposed and had no hatred, malice or ill will against the Witnesses. Petitioner, marshal MacFarland, took no action warranting relief against him and petitioner, mayor Goode, was a magistrate and not a peace officer, and neither of them took part in the blockade of September 15th. (R. 240-241 and Findings 5 and 6, R. 248-249).

4. The threat of mob violence in Lacona on September 15, 1946, was apparent and real, substantial and grave, and a clear and present danger to the peace and quiet of the town, and the sheriff's actions in blockading the town were honest, legal and proper and done for the purpose of preserving the peace and preventing bloodshed and the danger was serious enough to warrant him in taking the action he took, even though it interfered with the Witnesses' rights. (R. 243, and Findings 7 and 8, R. 249).

5. Dismissed the complaint. (R. 249-250).

The Circuit Court of Appeals reversed the decision, (R. 257), and held:

1. Respondents and others of Jehovah's witnesses have the right to hold religious meetings in the Lacona park without molestation and without permission of the Town Council, (Conclusion 1 on R. 270), and are entitled to be protected in the exercise of their constitutional rights of freedom of assembly, speech and worship. (Conclusion 3 on R. 270).

2. The motions adopted by the Lacona town council were unconstitutional, void and unenforceable, and not inconsequential. (R. 270 and Conclusion 2 on R. 270).

3. The petitioners, sheriff and mayor, acted in good faith, had no animosity against the Witnesses, acted on advice of counsel and believed what they did to keep the peace was legally permissible, (R. 268-269 and 270); but reversed the District Court's fact finding that on and prior to September 15, 1946, there was reasonable ground for believing that the threat of mob violence constituted a clear and present danger of a substantive evil of a serious nature which justified the blockading of the town on that day, and held that the blockade was an unlawful deprivation of the constitutional rights of Jehovah's witnesses. (Conclusion 4 on R. 270 and R. 266-268).

4. Did not grant an injunction, but held the District Court should retain jurisdiction to issue injunctions in future, if necessary.

5. Held all petitioners proper parties and rendered judgment for costs against them and remanded the case to the District Court for decree in conformity with the opinion. (R. 271-272).

JURISDICTIONAL STATEMENT.

1. Jurisdiction of this Court is conferred by and is invoked under Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925, 43 Stat., 928, (28 U.S.C.A. Sec. 347 (a)).

2. Constitutional and statutory provisions involved are:

First Amendment to the Constitution of the United States guaranteeing freedom of religion, speech and assembly.

Fourteenth Amendment to Constitution of the United States, Section 1, privileges and immunities and due process clauses.

Civil Rights Act of 1871 as amended, (17 Stat. 13, 8 U.S.C.A. 43), providing that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

3. The date of the judgment to be reviewed is October 20, 1947.

4. Jurisdiction of this Court is invoked because the case involves a collision between the Constitutional guarantees of free assembly, speech and worship on the one hand and State police power on the other, and the questions are of public importance. Cases relied upon to sustain jurisdiction are:

Douglas v. City of Jeannette, 319 U.S. 105.
Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105;
Bridges v. State of California, 314 U.S. 252;

Cantwell et al. v. State of Connecticut, 310 U.S. 296;
Schneider v. State of New Jersey, 308 U.S. 147;
Hague v. Committee for Industrial Organization, 307 U.S. 496.

QUESTIONS PRESENTED.

Questions presented are:

1. Constitutionality and lawfulness of the blockade of the town of Lacona and highways leading thereto on September 15, 1946, as a valid exercise of the state police power.

2. Error of the Circuit Court of Appeals in reversing the District Court's fact finding that prior to and at the time of said blockade there was reasonable ground for believing there existed a clear and present danger of a substantive evil of a serious nature, namely, mob violence and bloodshed.

3. The Circuit Court of Appeals erred in declaring the enactments of the Lacona Town council void on the ground of their unconstitutionality in the face of the fact as found by the trial Court that they were inconsequential because they contained no penalty clause and were unenforceable and were not applied or enforced, but were known by the Jehovah's witnesses to be unenforceable and were wholly disregarded by them.

4. Error of the Circuit Court of Appeals in establishing the rights of assembly, speech and worship as "absolutes" and retaining jurisdiction in the District Court to enter future mandatory injunctions to enforce these rights as "absolutes", thereby abolishing local police power and any measure of local supervision and control over the park in the future.

5. The Circuit Court of Appeals erred in rendering any judgment against petitioner MacFarland, against whom no evidence was introduced.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals improperly reversed the District Court's fact finding that prior to and at the time of the blockade of the town of Lacona and the park therein and the roads leading thereto on September 15, 1946, there was reasonable ground for believing that there existed a clear and present danger of a substantive evil of a serious nature, viz., violence, rioting and bloodshed, which justified the blockade as a reasonable exercise of the state police power. The District Court's fact finding not only wasn't clearly erroneous but was amply supported by the evidence. The fact finding substituted by the Circuit Court of Appeals to the effect that no such clear and present danger existed is directly contrary to the evidence.

Civil Procedure Rule 52 (a).

2. The decision of the Circuit Court of Appeals that said blockade was an unlawful deprivation of the constitutional rights of Jehovah's witnesses denies the supremacy and proper exercise of the state police power to protect the health, safety, comfort, convenience and general welfare of the people and is not in accord with the decisions of this Court in the following cases, among others:

Schenck v. United States, 249 U.S. 47;
Whitney v. California, 274 U.S. 357;
Watchtower Bible and Tract Soc. v. City of Bristol, 24 F. Supp. 57, Aff'd. 305 U.S. 572;
Cantwell v. Connecticut, 310 U.S. 296;
Cox v. State of New Hampshire, 312 U.S. 569;
Bridges v. California, 314 U.S. 252;
Chaplinsky v. State of New Hampshire, 315 U.S. 568;
Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105;
Prince v. Commonwealth of Massachusetts, 321 U.S. 158.

3. The Circuit Court of Appeals erred in declaring the enactments of the Lacona town council void on the ground of their unconstitutionality in the face of the fact as found by the trial Court that they were inconsequential because they contained no penalty clause and were unenforceable and were not applied or enforced, but were known by the Jehovah's witnesses to be unenforceable and were wholly disregarded by them.

Cox v. State of New Hampshire, 312 U.S. 569;
Douglas v. Jeannette, 319 U.S. 157, 163;
Beal v. Missouri Pacific R. Co., 312 U.S. 45, 50;
Di Giovanni v. Camden Ins. Ass., 296 U.S. 64;
American Federation of Labor et al., v. Watson et al., 327 U.S. 582, 593.

4. Error of the Circuit Court of Appeals in establishing the rights of assembly, speech and worship as "absolutes" and retaining jurisdiction in the District Court to enter future mandatory injunctions to enforce these rights as "absolutes", thereby abolishing local police power and any measure of local supervision and control over the park in the future.

All authorities, supra.

5. The judgment of the Circuit Court of Appeals against petitioner MacFarland, as to whom no evidence was offered connecting him with the case, is plainly erroneous.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings herein; and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit be reversed

by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

J. O. WATSON, JR.,
Attorney for Petitioners.

WILLIAM B. SLOAN,
HERSCHEL G. LANGDON,
M. C. HERRICK,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Southern District of Iowa is reported in 69 F. Supp. 778 and appears at Record 232.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 163 F 2d 877 and appears at Record 257.

II.

SUMMARY OF THE ARGUMENT.

1. The Circuit Court of Appeals erred in reversing the District Court's fact findings that the threat of mob violence in Lacona on September 15, 1946 was apparent, real, substantial and grave and justified the blockade of the town as a reasonable exercise of the state police power, which findings were supported by the evidence—and in substituting its own fact findings that no such clear and present danger existed, which findings were contrary to the evidence.

2. The decision of the Circuit Court of Appeals that said blockade was an unlawful deprivation of the constitutional rights of Jehovah's witnesses denies the supremacy and proper exercise of the state police power to protect the health, safety, comfort, convenience and general welfare of the people.

3. The Circuit Court of Appeals erred in declaring the enactments of the Lacona town council void on the ground of their unconstitutionality in the face of the fact as found by the trial Court that they were inconsequential because

they contained no penalty clause and were unenforceable and were not applied or enforced, but were known by the Jehovah's witnesses to be unenforceable and were wholly disregarded by them.

4. Error of the Circuit Court of Appeals in establishing the rights of assembly, speech and worship as "absolutes" and retaining jurisdiction in the District Court to enter future mandatory injunctions to enforce these rights as "absolutes", thereby abolishing local police power and any measure of local supervision and control over the park in the future.

5. The Circuit Court of Appeals erred in rendering any judgment against petitioner MacFarland, against whom no evidence was introduced.

III.

ARGUMENT.

1.

THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S FACT FINDINGS THAT THE THREAT OF MOB VIOLENCE IN LACONA ON SEPTEMBER 15, 1946 WAS APPARENT, REAL, SUBSTANTIAL AND GRAVE AND JUSTIFIED THE BLOCKADE OF THE TOWN AS A REASONABLE EXERCISE OF THE STATE POLICE POWER, WHICH FINDINGS WERE SUPPORTED BY THE EVIDENCE—AND IN SUBSTITUTING ITS OWN FACT FINDINGS THAT NO SUCH CLEAR AND PRESENT DANGER EXISTED, WHICH FINDINGS WERE CONTRARY TO THE EVIDENCE.

The undisputed evidence is that when Jehovah's witnesses attempted to hold the second of their four proposed weekly meetings in the Lacona park on September 15, 1946, there were from 100 to 150 Witnesses present (R. 125)

and a crowd of 700 or 800 people collected in and around the block square park. (R. 259). General fighting broke out between the Witnesses and members of the crowd, principally ex-service men, which resulted, as the Circuit Court of Appeals conceded, in "bloody faces, black eyes, broken glasses and teeth, and torn clothing." (R. 259).

The petitioner, sheriff Johnson, not only observed the extent and seriousness of the injuries and damage when he arrived at the scene of the fight shortly after it was over, but he acquainted himself with the details of it the following week while he listened to the testimony in the trials of the numerous citizens of Lacona whom he had arrested as an outgrowth of this very fighting. (R. 75, 76).

During the same week the petitioner, mayor Goode, heard it talked around town that G. I.'s were coming from Indianola, Osceola, Chariton, Knoxville and Ottumwa to stop the meeting of Jehovah's witnesses in Lacona on the following Sunday, September 15. (R. 55). He heard that G. I. boys were coming from so many different places that they didn't think they could keep down trouble and they called the sheriff down to Lacona to see what he could do about it. (R. 45).

During this same week the petitioner, sheriff Johnson, heard reports about the possibility of trouble if the proposed meeting was held in Lacona on the next Sunday, September 15; he heard that there would be hundreds of G. I.'s there (as many as 1500 from Ottumwa); and the sheriff at Chariton in an adjoining county had warned him that neither of them could handle the G. I.'s who proposed to come from Chariton alone. (R. 267).

The sheriff sought legal advice from the town attorney, the county attorney and the Attorney General of the State of Iowa. He was denied the help of the Iowa National Guard. (R. 77, 78). He was advised by the Attorney

General's office to prevent any meeting in Lacona the following Sunday by a uniform general blockade against everyone, except for emergency cases. His own judgment of the facts agreed with this advice and he followed this course.

On this record the District Court made the following fact findings:

"11. After the difficulties attending the meeting of September 8, 1946, an inflamed situation developed among the citizens of the Town of Lacona and surrounding country and even in adjoining counties. So much so that the sheriff of at least one county telephoned the sheriff of Warren County advising him that a mob from his county would attend the meeting of September 15 and that they could not be restrained. (R. 247).

"12. The sheriff and mayor after the meeting of September 8 tried to dissuade the Witnesses from having any further meetings as they were afraid of serious trouble which they could not handle; but the Witnesses insisted that they were going to come whether there was trouble or not. (R. 247).

"13. The sheriff and the mayor sought advice from the county attorney of Warren county and of the Attorney General of the State of Iowa and were assured that under the circumstances they would be within their rights if they felt it necessary to blockade the town and not permit anyone to enter or leave the town on the date of the meeting of September 15, 1946. (R. 248).

"14. That the sheriff and the mayor both believed that this course was the best course to pursue that

would prevent riots and bloodshed and the only course of conduct that would permit them to control the situation and preserve the peace of the community. (R. 248).

"15. That neither the mayor nor the sheriff conspired with others with reference to the actions that they took in trying to keep down riots and bloodshed on the meeting of September 15. (R. 248).

"16. On September 15, 1946, the threat of mob violence in Lacona was a substantive evil and a clear and present danger, substantial and grave." (R. 248).

Petitioners submit that on the evidence these fact findings of the District Court were not erroneous, but amply supported by the evidence, and the only findings which could be made in accord with the evidence.

The Circuit Court of Appeals rejected these findings of fact and substituted its own, stating:

"We find no substantial evidence in the record to support the conclusion that the proposed religious meetings of the Jehovah's witnesses in the town of Lacona were actually fraught with any substantial danger to the peace and welfare of the State of Iowa." (R. 266).

Characterizing the fears of the sheriff and mayor for the safety of the community as based upon unsubstantiated rumors and reports, the Circuit Court of Appeals stated:

"There is certainly no presumption that ex-servicemen of normal mentality are in the habit of suppressing religious meetings by violence, no matter what they may think of those who hold the meetings." (R. 268).

These statements and fact findings which the Circuit Court of Appeals substituted for those of the District Court are in direct conflict with the record that a riot had already taken place on September 8 in which ex-servicemen had participated, and that many people had been seriously injured by mob violence in that riot.

The decision of the Circuit Court of Appeals on this fact question in the case is a complete departure from Civil Procedure Rule 53 (a) and the settled course of judicial procedure. The result of it is that the Circuit Court of Appeals has lost sight of the realities of the case and its decision is a solution of an imaginary set of facts instead of those before the Court.

2.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT SAID BLOCKADE WAS AN UNLAWFUL DEPRIVATION OF THE CONSTITUTIONAL RIGHTS OF JEHOVAH'S WITNESSES DENIES THE SUPREMACY AND PROPER EXERCISE OF THE STATE POLICE POWER TO PROTECT THE HEALTH, SAFETY, COMFORT, CONVENIENCE AND GENERAL WELFARE OF THE PEOPLE.

The decision of the Circuit Court of Appeals on the facts in this case results in a denial of the state police power under the so-called "clear and present danger" rule established by the decisions of this Court.

In *Schenck v. United States*, 249 U.S. 47, defendants assailed the statute under which they were indicted and convicted on the ground that it abridged free speech and press, as guaranteed by the First Amendment to the Constitution of the United States. Mr. Justice Holmes stated at Page 52:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Whitney v. California, 274 U.S. 357, contains an elaborate exposition of the rule which is summarized in the following statement from the separate concurring opinion of Mr. Justice Brandeis at page 376.

"To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."

In *Watchtower Bible and Tract Society v. City of Bristol*, 24 F. Supp. 57, affirmed in 305 U.S. 572, the rule is stated:

"The general police powers are reserved to the states, and the power to protect life and public safety,

to preserve good order and the public morals, and to protect the property of its citizens is within the limits of the states' dominion, by any legislation appropriate to their end which does not encroach upon the rights guaranteed by the Constitution * * *.

"Retention by the states of the police power necessary for their internal government has long been recognized * * *. Upon its proper exercise has depended the public health and morals."

In *Cox v. State of New Hampshire*, 312 U.S. 569, Jehovah's witnesses attacked a statute requiring them to obtain a license for a parade as violative of the First and Fourteenth Amendments to the Constitution of the United States, and former Chief Justice Hughes stated in the opinion on page 574:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."

In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, Mr. Justice Rutledge sustained the police power of the State of Massachusetts in its child labor law against the claim of Jehovah's witnesses that it infringed their constitutional guarantee of freedom of worship.

A collision between constitutional guarantees and state

police power in the respective spheres of their operation is a serious matter but, as pointed out repeatedly by this Court, the enjoyment of constitutional guarantees presupposes the existence of an organized society and ultimately the social fabric must be held together by the proper exercise of the state police power.

The police power was exercised in the case at bar to prevent violence, rioting, bloodshed, personal injury and possible death. These are substantive evils and their serious nature is self-evident. Under proper fact findings on the evidence, there were reasonable grounds for believing the danger was clear and present. The decision of the Circuit Court of Appeals is erroneous in denying the existence and operation of the state police power on these facts and is not in accord with the decisions of this Court.

3.

THE CIRCUIT COURT OF APPEALS ERRED IN DECLARING THE ENACTMENTS OF THE LACONA TOWN COUNCIL VOID ON THE GROUND OF THEIR UNCONSTITUTIONALITY IN THE FACE OF THE FACT AS FOUND BY THE TRIAL COURT THAT THEY WERE INCONSEQUENTIAL BECAUSE THEY CONTAINED NO PENALTY CLAUSE AND WERE UNENFORCEABLE AND WERE NOT APPLIED OR ENFORCED, BUT WERE KNOWN BY THE JEHOVAH'S WITNESSES TO BE UNENFORCEABLE AND WERE WHOLLY DISREGARDED BY THEM.

The District Court took the position that the motions adopted by the Lacona Town Council required no action at the hands of the Court because they carried no penalty clause and were not enforceable and were not enforced and Jehovah's Witnesses knew they were of no force or

effect and, therefore, wholly disregarded them. The District Court held that these motions were slight and inconsequential and did not constitute any basis for action by the Court in order to prevent irreparable injury both clear and imminent. (R. 240).

The Circuit Court of Appeals reversed this holding and pronounced these enactments of the town council void. (R. 270).

The holding of the Circuit Court of Appeals seems to be a clear departure from *Cox v. State of New Hampshire*, 312 U.S. 569, where Jehovah's Witnesses appealed from their conviction for the violation of a state statute of New Hampshire which required a license to be obtained from the selectmen of the town or from a licensing board of the town before a parade could be held in the public streets. It was claimed there that the statute was void because it offended against the First and Fourteenth Amendments to the Constitution of the United States, but this Court held in an opinion written by former Chief Justice Hughes that the regulation requiring a license or permit to be obtained from the town council or selectmen was not an unreasonable regulation governing the use of public property in which the rights of all other members of the public likewise had to be considered.

The other cases cited under this ground for issuance of the writ illustrate the impropriety and lack of necessity for a Federal Court interfering in the internal affairs of the states on slight and inconsequential grounds.

4.

ERROR OF THE CIRCUIT COURT OF APPEALS IN ESTABLISHING THE RIGHTS OF ASSEMBLY, SPEECH AND WORSHIP AS "ABSOLUTES" AND RETAINING JURISDICTION IN THE DISTRICT COURT TO ENTER FUTURE MANDATORY INJUNCTIONS TO ENFORCE THESE RIGHTS AS "ABSOLUTES", THEREBY ABOLISHING LOCAL POLICE POWER AND ANY MEASURE OF LOCAL SUPERVISION AND CONTROL OVER THE PARK IN THE FUTURE.

The Circuit Court of Appeals not only invalidated the enactments of the Lacona Town Council but held in its numbered conclusions 1 and 3, (R. 270), as follows:

> "1) "That they and others of Jehovah's Witnesses have the right to hold religious meetings in the public park in the Town of Lacona, Iowa, without molestation and without securing the permission of the Town Council; * * *
>
> (3) "That the Jehovah's Witnesses are entitled to be protected in the exercise of their constitutional rights of freedom of assembly, speech and worship."

The Circuit Court of Appeals further held, (R. 270):

> "The decree should contain a clause retaining jurisdiction of the case for the purpose of issuing injunctive orders in the event such orders shall become necessary to secure the plaintiffs against possible future attempts by the defendants, or any of them, to deprive the plaintiffs of their rights."

The Circuit Court of Appeals therefore has adjudicated that Jehovah's Witnesses have the right to use this park

without interference by anyone and without permission of any kind from anybody for all time in the future and these rights are made "absolute", without any qualification whatever. It is submitted that this decision abolishes local police power and deprives local authorities of any supervision or control over this park. Moreover, the requirement of the Circuit Court's decision that Jehovah's Witnesses be secured and protected in the exercise of these absolute rights deprives the state peace officers of any and all authority to administer the police power to any extent in connection with this park except to protect Jehovah's Witnesses therein, which they are required to do at their peril and without regard to any facts bearing upon their ability to do so, and with absolute liability under the Civil Rights Act for their failure to do so.

The Circuit Court of Appeals found no basis in the facts of this case for issuing an injunction against the petitioners at this time and it is submitted that its decision goes entirely beyond the complaint in requiring the District Court to retain jurisdiction to issue mandatory injunctions in the future to secure the absolute rights of Jehovah's Witnesses as declared by the Circuit Court. Under this decision the petitioner, Sheriff Johnson, whose warrant of authority is held under the State of Iowa, is powerless to discharge his duty as a peace officer in the enforcement of local police power except only as he is directed by affirmative mandatory injunction issued out of the Federal District Court. The authority of the District Court is restricted and limited by the Circuit Court of Appeals to a mandatory injunction directing the sheriff to exercise his local police power in the internal affairs of the State of Iowa in one way only, and that is to uphold the rights of Jehovah's Witnesses to free assembly, speech and worship in the public park of Lacona without regard to his ability or his

liability or the rights of any other members of the general public. It is respectfully submitted that this decision is wrong.

5.

THE CIRCUIT COURT OF APPEALS ERRED IN RENDERING ANY JUDGMENT AGAINST THE PETITIONER MacFARLAND, AGAINST WHOM NO EVIDENCE WAS INTRODUCED.

The Circuit Court of Appeals held that the petitioners were all proper parties to this action, (R. 271), and rendered judgment for costs against the petitioner, Paul MacFarland. (R. 271).

The petitioner MacFarland is not a member of the Lacona council, but is the town marshal, and no evidence of any kind was ever introduced against him in this case showing that he had any connection whatever with the case. The entry of judgment against him is without any justification of any kind.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 484

Lewis Johnson, Le Goode, Paul MacFarland and Town of Lacona, a municipal corporation

Petitioners

v.

Charles E. Sellers, L. R. Olmstead, Herman Aaldura, Lester Newman, Richard Dickey and Willard Moore

Respondents

Respondents' MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit

HAYDEN C. COVINGTON
Counsel for Respondents

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SUPREME COURT OF THE UNITED STATES

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Respondents' MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit

MAY IT PLEASE THE COURT:

This case presents important questions concerning a grave denial by petitioners of respondents' civil liberties. However, the questions have previously been decided by this Court in favor of respondents and against the petitioners. The decision of the court below is in accord with the former decisions of this Court. There is no conflict.

The court below has not departed from any principle or applicable rule of law established by this Court for maintenance of the balance between the police power of the state and the orderly exercise of civil liberties by the free people of the United States.

In addition to the brief observations made below, the opinion of the court of appeals is here adopted and submitted in opposition to the petition for writ of certiorari. The opinion and facts stated therein show that there was no clear and present danger which justified the extreme steps taken by petitioners. (See the record [266-269] printed and accompanying the petition.) As to 'clear and present danger', the decision of the court below is in accord with *Craig* v. *Harney,* 67 S. Ct. 1249; *Pennekamp* v. *Florida,* 328 U. S. 331; *Bridges* v. *California,* 314 U. S. 252.

On the point of clear and present danger the attention of the Court is called to the opinion of Mr. Chief Justice Hughes in *Sterling* v. *Constantin,* 287 U. S. 378. In that case Governor Sterling of Texas declared martial law in the east Texas oil fields and put the production of oil under his supervision pursuant to executive order. There was much evidence that a civil war, violence, bloodshed and anarchy would immediately result in the oil fields if proration was not enforced in a proper manner by the governor. Reports of clear, present and immediate danger were brought to the attention of the governor. (287 U. S. at p. 391) He relied upon the general laws of Texas in respect to breach of the peace and unlawful assembly as justification for the extreme measures taken by him. (*Ibid.* p. 394)

The petitioners make a ridiculous contention, which was adopted by the district court, but rejected by the court of appeals, that the unconstitutional regulation of the Town of Lacona had no criminal sanctions and, since no prosecutions were instituted in the courts of Iowa against respondents because of their use of the park contrary to the void regulation, the regulation was inconsequential

to the rights of the parties. Because of these facts the petitioners contend that there was no interference with respondents' civil liberties through any legal process, therefore the regulation was inconsequential.

The district court in its memorandum decision attempted to side-step the constitutional issue in the case by stating that the actions of the petitioners under the regulation "were slight and inconsequential" under the facts shown. [240] In his findings he said that the resolution "did not carry any enforcement clause." In his conclusions the judge of the district court found that the resolutions "were not sufficient and are too inconsequential to warrant a federal court of equity in restraining" them. [248]

In his memorandum the judge of the district court said: "Neither the mayor nor the sheriff . . . tried to enforce this resolution." [240] This statement of the court is not only unsupported by the facts and the record but is contrary to the undisputed evidence.

The record shows that the city attorney, the sheriff and the county attorney discussed the matter of the enforcement of the resolution with the mayor. [32-33, 67]

The second resolution commanded the mayor to serve notice on the respondents "that the town council have prescribed Rules for the use of the public park in Lacona" and that the holding of meetings in the park without permission of the council would be "deemed an unlawful act and be punished as such." [32] Thereupon the mayor and town council handed to the sheriff the written notice to serve upon respondents. [67] The sheriff served the notice. [68]

The notice stated that pursuant to Chapter 389 of the 1946 Code of Iowa and the city ordinance and resolutions thereunder, the town of Lacona "has prescribed rules for the use of the public park in Lacona by groups holding meetings, and that you have not complied therewith and obtained permission to use the park." [33-34] In such notice Jehovah's witnesses were informed that the use of the park

without permission would be "deemed an unlawful act and be punished as such." [34]

The court of appeals said: "We do not agree with the District Court that the resolutions of the Town Council, adopted to prevent the Jehovah's witnesses from using the park without a permit, were inconsequential. The resolutions obviously were passed to establish a basis for treating the Jehovah's witnesses as law violators and to justify barring them from the park." [270]

Chapter 389 of the 1946 Code of Iowa confers authority upon the council of Lacona to control the park and such chapter, as well as Chapter 370 of the 1946 Code, also confers authority upon the courts of Iowa to prosecute persons violating the resolutions of the cities of Iowa passed in respect to their parks and public grounds. Therefore the repeated statements of petitioners about the regulation's not being a consequential law, are contrary to law and fact.

It may be a rule of criminal law of some states that an ordinance without sanctions is no ordinance at all for the purpose of prosecution. But under the federal Constitution and the federal Judicial Code it is not necessary for an ordinance, resolution, bylaw or motion to have penal provisions or sanctions in it. Any motion, order, rule, resolution, bylaw or ordinance that is promulgated by the state or one of its subdivisions is considered, under federal law, to be a state statute or state law. *Hamilton* v. *Regents,* 293 U. S. 245, 257-258. See also *Jamison* v. *Texas,* 318 U. S. 413, 414-415.

It is conceded that no effort has ever been made or threatened to be made to prosecute respondents for their use of the park contrary to Chapters 370 and 389 of the Code. The whole controversy in this lawsuit is over the means employed by petitioners Mayor Lo Goode and Sheriff Johnson to enforce the regulation which was by forcibly and unlawfully barring respondents from the park and the town of Lacona. Their method is clearly unconstitutional

and in violation of every rule of law and decency in a democratic republic, like America, dedicated to the four freedoms.

In *Douglas* v. *Jeannette,* 319 U. S. 157, denial of injunction was based upon the fact that it did not appear from the record that petitioners had been threatened with any injury other than that incidental to any criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. *Douglas* v. *Jeannette,* 319 U. S. 157, 164.

The rule established which requires federal courts to keep hands off the enforcement of unconstitutional state statutes is confined to instances where criminal proceedings are being prosecuted. Here the evidence shows no criminal proceedings have been threatened or instituted.

The facts in this case can be distinguished from those in the *Douglas* case and all the other cases where federal injunctions have been denied to Jehovah's witnesses and other persons seeking to enjoin the enforcement of unconstitutional state statutes.

This case falls squarely within the rule announced in *Hague* v. *C. I. O.,* 307 U. S. 496. There the city officials, after denying a permit to use the park, forcibly removed plaintiffs from the park and deported them from Jersey City. Here petitioners forcibly barred and blockaded Jehovah's witnesses from Lacona and forcibly prevented their entering the town or park for the purpose of holding meetings in the park. The facts of the denial of the use of the park here are identical with those in connection with denial of use of the park in the *Hague* case. There Jersey City had an ordinance prohibiting use of the park without a permit from the director of public safety. (307 U. S. 496, 502, note 1) There, as here, the permit was denied because

it was felt the speakers were so unpopular with inhabitants of the city that if they were permitted to speak in the park violence would result. After denial of the permit at Jersey City the speakers were barred from the park, just as the speakers and their audience were barred from the park at Lacona. The difference in the means employed in the two cases to keep the speakers and audiences out of the park does not distinguish the *Hague* case from this case. There is no difference between barring one from the park by forcibly ejecting him and by forcibly denying him the right to enter it. In both cases the citizen has been barred and denied the right to enter the park. See the discussion of the facts in the opinion of this Court in *Hague* v. *C. I. O.*, 307 U. S. 496, 501-505, 506. See also the more extensive statement of the facts, ordinances and activity appearing in the opinion of Biggs, C. J. (CCA-3) 101 F. 2d 774. The dissenting opinion of Judge Davis in the Third Circuit Court of Appeals in the *Hague* case quotes the letters of protest and other evidence on which denial of the permit to use the park was based. He also adverts to the threatened mob violence, which is the same in this case. In that case the director of public safety, as justification for his denial of the use of the park, said: "On the evening of December 28, 1937, a great mass meeting was held in the Armory at Jersey City, attended by over three thousand persons, all of whom were veterans. . . . Violent disorder was threatened on the part of the veterans in case the meeting was held. Announcements were made from the floor—and these announcements had the approval of the meeting—that if I should refuse to honor the Veterans' protest and grant a permit for the meeting, the Veterans would take the matter into their own hands and see to it that the meeting would be broken up."

Mr. Chief Justice Stone, in *Douglas* v. *Jeannette*, 319 U. S. 157, distinguished the *Douglas* case from the *Hague* case on the ground that the *Hague* case was "where local

officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial." (319 U. S. at 164) In the case at bar respondents have been treated in the same manner as were plaintiffs in the *Hague* case. Here the respondents have not had a trial in the state courts of Iowa because of their alleged illegal use of the park. Respondents have been barred entirely from the park, in the same way as were plaintiffs in the *Hague* case.

It was the *ultra vires,* illegal action of the officials in the *Hague* case, in depriving plaintiffs of the use of the park without invoking the criminal process of the state courts, which gave rise to the right to the injunction against the officials of Jersey City. Here it is also the unauthorized, illegal actions of petitioners, in barring (without resort to the courts of Iowa) respondents from the park, which gave rise to the jurisdiction of the court to grant the injunction, all of which distinguishes this case from the *Douglas* case for each and every one of the reasons that the Chief Justice distinguished the *Hague* from the *Douglas* case.[1]

Insofar as equitable relief was proper, the above references to the *Hague* case and the *Sterling* case are sufficient. But complaint is made of the order of the court retaining jurisdiction. Since this was a proper declaratory judgment action (See *United Public Workers of America* v. *Mitchell,* 67 S. Ct. 555.) it was proper to retain jurisdiction for supplemental relief. *Chase National Bank* v. *Citizens Gas Company* (CCA-7) 113 F. 2d 217; *United States Galvanizing & Plating Equipment Corp.* v. *Hanson-Van Winkle Mun-*

[1] In unusual circumstances even enforcement of state criminal statutes, taxation statutes and other statutes may be enjoined by federal injunction. Cline v. Frink Dairy Co., 274 U. S. 445; *Ex parte* Young, 209 U. S. 123, 162-165; Pierce v. Society of Sisters, 268 U. S. 510, 535-536; Greene v. Louisville & I. R. Co., 244 U. S. 449, 506-507, 520-521; Sterling v. Constantin, 287 U. S. 378, 393, 403-404; Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426-434; Moore v. Fidelity & Deposit Co., 272 U. S. 317; Terrace v. Thompson, 263 U. S. 197.

ning Co. (CCA-4) 104 F. 2d 856. See also Borchard, *Declaratory Judgments*, 1941, at pages 438-444.

Wherefore, the petition for the writ of certiorari should be denied because the decision of the court below is plainly right and in accord with the decisions of this Court and there is no substantial federal question which has not been decided but which should be decided by this Court.

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